

(1999) 11 MP CK 0016
In the Madhya Pradesh High Court
Case No : S.A. No. 1011 of 1996

Anjora Bai Deriha

APPELLANT

Vs

Manohar

RESPONDENT

Date of Decision : 18-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Succession Act, 1956 — Section 15, 16, 8
Transfer of Property Act, 1882 — Section 122, 123, 5

Citation : (2000) 2 MPLJ 32

Hon'ble Judges : Saraswati Prasad Khare, J

Bench : Single Bench

Advocate : M. Hafiaullah, for the Appellant; B.R. Nagle, for the Respondent

Judgement

S.P. Khare, J.

This is a second appeal u/s 100, Civil Procedure Code. The following substantial question of law was formulated at the time of admission of this appeal:--

"Whether in the absence of proper pleadings to the effect, the learned Appellate Court was justified in holding the document (Ex. D. 1) executed by deceased Smt. Chitkunwar bai as Will".

Plaintiff Anjorabai is daughter of Deriha from his first wife. Deceased defendant No. 1 Chitkunwarbai was second wife of Deriha. He married her after the death of his first wife. The plaintiff originally claimed half share in the lands and the house in dispute as per details given in annexure "A" to the plaint. The land is 2.04 acres of Khasra Nos. 256, 599, 939, 1094 and 1148 of village Bhamoo, Tehsil and District Bilaspur. The written statement was filed jointly by Chitkunwarbai and defendant No. 2 Manohar. In the written statement there is an averment that Chitkunwarbai has executed the document dated 5-8-1984 (Ex. D-1) "Supurdnama" in favour of the defendant No. 2 who has got the lands mutated in his name in the year 1984-85. The plaintiff claims that now after the

death of Chitkunwarbai she is entitled to the whole of the property in dispute as she is her nearest heir as per sections 15 and 16 of the Hindu Succession Act, 1956. Defendant Manohar claims the property on the ground that the said document is the Will of the owner of the property.

The property belonged to Chitkunwarbai and on her death the plaintiff is her nearest heir. She has not left behind any heir of Entry (a) to section 15 of the Hindu Succession Act, 1956. The plaintiff being the stepdaughter of Chitkunwarbai is not covered by Entry (a) but she can succeed to her property as an heir of her husband under Entry (b). The devolution upon the heirs of the husband of the female intestate shall be in the same order and according to the same rules as would have applied if the property had belonged to the husband and he had died intestate in respect thereof immediately after her death. (Section 16-Rule 3 of the Act of 1956). (See Mulla's Hindu Law 17th Edition Vol. II page 333). Defendant Manohar is son of Deriha's brother. The plaintiff is preferential heir falling in Class-I of the Schedule to section 8 of the Act. In case of a female intestate who dies without leaving any issue or husband, the terminus a quo will be the husband of the intestate as if he were the propositus and the ascertainment of the heirs will once again commence from Class-I of the Schedule.

Therefore, unless the document Ex. D-1 is construed as a Will the property will go to the plaintiff. This document reads as under:--

256

0-01

1-42

599

0-02

939

0-09

1094

0-76

1148

1-24

2-04

1-42

A careful scrutiny of this document shows that it is not a Will. The expression "Will" is defined in the Indian Succession Act, 1925, as the legal declaration of

the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is distinguishable from "transfer of property" defined in section 5 of the Transfer of Property Act, 1882. According to this section "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons. Thus transfer is conveyance of property inter-vivos. A Will operates on the death of testator. Gift as defined in section 122 of the Transfer of Property Act is also a transfer of property and as per section 123 it can be effected by a registered instrument only. It operates in praesenti and not after the death of the testator.

In Ram Prasad vs. Bherulal, AIR 1992 MP 44, it has been held by this Court that if the author of the document nowhere mentions that it will operate after his death, it cannot be interpreted as a Will. In the present case the author states In the result the judgment and decree of the first Appellate Court are set aside and of those of the trial Court are restored. Costs as incurred.